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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5903

McARTHUR CORBITT,

Appellant,

v.

THE STATE OF NEW JERSEY,

Appellee.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS

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Note, "The Unconstitutionality of Plea Bargaining," 83 Harv. L. Rev. 1387 (1970) 17

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Poe, "Capital Punishment Statutes in the Wake of United States v. Jackson: Some Unresolved Questions," 37 Geo. Wash. L. Rev. 719 (1969) 17
"The Supreme Court, 1967 Term," 82 Harv. L. Rev. 63, 156 (1968) 17
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MOTION TO DISMISS

The Appellee moves the Court to dismiss the appeal herein on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

The state statute involved and the nature of the case.

A. The Statute

This matter involves the constitutionality of the sentencing scheme of the New Jersey murder statutes, N.J.S.A. 2A:113-1, 2, 3, and 4, as judicially altered in *State* v. *Funicello,* 60 N.J. 60, 286 A.2d 55 (1972), *cert.* den. *sub nom. New Jersey* v. *Presha,* 408 U.S. 942 (1972). As modified by the New Jersey Supreme Court, N.J.S.A. 2A:113-3 now provides that no plea of guilty shall be received upon any indictment for murder. If such a plea is offered, it must be disregarded, a plea of not guilty must be entered, and a jury duly impaneled must try the case. The statute permits, however, the accused to plead *non vult* or *nolo contendere* to the indictment. Upon such a plea, the sentence to be imposed is either life imprisonment or, in the alternative, the same as that imposed upon a conviction of second degree murder.

N.J.S.A. 2A:113-4 provides that every person convicted of first degree murder shall be sentenced to life imprisonment.[1] Upon a conviction of second degree murder, an accused is to be imprisoned for a maximum of thirty years. Thus, one convicted of first degree murder by a jury must receive a life sentence while one pleading *non vult* or *nolo contendere may* receive a sentence having a maximum of thirty years or life imprisonment.

[1] Prior to *Funicello* v. *New Jersey,* 403 U.S. 948 (1971), and *State* v. *Funicello, supra,* 60 N.J. 60 (1972), a jury conviction of first degree murder mandated the imposition of the death penalty unless the jury recommended life imprisonment.

B. The proceedings below

The appellant, McArthur Corbitt, was convicted by a jury on April 10, 1973, of felony murder pursuant to N.J.S.A. 2A:113-1. On May 16, 1973, the mandatory sentence of life imprisonment was imposed. A Notice of Appeal to the Superior Court of New Jersey, Appellate Division, was filed on July 31, 1973.

On September 23, 1975, the Superior Court, Appellate Division, affirmed the conviction of felony-murder. A subsequent Petition for Certification to the Appellate Division was filed in the New Jersey Supreme Court and was granted on February 18, 1976. The certification was "limited to the question of the validity of the mandatory life sentence upon a jury conviction for murder. . . ."

The appellant argued before the New Jersey Supreme Court that the sentencing scheme of N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4 infringed upon his Fifth Amendment right not to plead guilty and his Sixth Amendment right to a jury trial, and deprived him of equal protection under the Fourteenth Amendment. The New Jersey Supreme Court found the sentencing scheme to be constitutional and affirmed the conviction. *State* v. *McArthur Corbitt,* 74 N.J. 379, 378 A.2d 235 (1977). A Notice of Appeal to this Court was filed in the New Jersey Supreme Court on November 30, 1977.

II.

The case presents no substantial question not previously decided by this Court.

A. The sentencing provisions of N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4 do not place an unconstitutional burden upon a defendant's right to contest his guilt before a jury.

The Appellant, McArthur Corbitt, was convicted by a jury of felony-murder. Consequently, the trial court imposed the mandatory sentence of life imprisonment. See N.J.S.A. 2A:113-4; *State* v. *Funicello,* 60 N.J. 60, 286 A.2d 55, *cert.* den. *sub nom. New Jersey* v. *Presha,* 408 U.S. 942 (1972); *State* v. *Robinson,* 139 N.J. Super. 58, 352 A.2d 587 (App. Div. 1975). Had he chosen to plead *non vult* to the indictment, and had the court accepted the plea, he clearly would have been eligible for a less harsh sentence. See N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4. Although after pleading *non vult* a defendant may be sentenced to life imprisonment, the New Jersey Statutes specifically authorize the trial court to impose a lesser sentence not to exceed thirty years. At issue is whether the possibility of receiving a "lesser term" by entering a plea of *non vult* unnecessarily exacts a penalty with regard to an accused's assertion of his Fifth Amendment right to plead not guilty and his Sixth Amendment right to a jury trial.

It is the position of the State of New Jersey that the sentencing scheme of its murder statutes does not needlessly chill assertion of those rights guaranteed by the Fifth and Sixth Amendments, nor does it penalize those who elect to contest their guilt before a jury. The penalty of life imprisonment is not contingent upon an accused's decision to defend against the charges which have been brought. Similarly, a plea of *non vult* does not assure a

lesser sentence than that mandated following a conviction of first degree murder by a jury. Hence, the statutes impose no burden on the exercise of an accused's constitutional rights.

Even if it is assumed that a burden is imposed, it can hardly be said that a defendant is "needlessly" penalized by virtue of his election not to plead *non vult.* In short, such a burden, if one exists, is inconsequential and, in any event, is reasonably related to a proper governmental goal. While it is true that no man should be subject to an enhanced penalty because he defends against a charge, it does not follow that an accused who frankly acknowledges his guilt should not be given consideration on that account. The concept that one who confesses is a better prospect for rehabilitation has long been accepted by our courts. Further, one who candidly admits his guilt should not, by virtue of that fact be denied leniency. So called "plea bargaining," which in part is premised upon the idea that a defendant who confesses is entitled to some degree of compassion, has respectable support in New Jersey and throughout the country. It would be specious to contend that the Fifth Amendment bars a potentially less severe punishment upon an admission of guilt. We submit that the New Jersey murder statutes do not infringe upon an accused's Fifth and Sixth Amendment rights and do not "needlessly" and "unnecessarily" penalize those who elect to proceed to trial and to assert their innocence of the crime charged.

1. No penalty is imposed upon one who chooses to defend against a murder charge.

It is well established that the State may not exact an unnecessary price for the assertion of a constitutional right. See *e.g., United States* v. *Jackson,* 390 U.S. 570

(1968), *cf. Lefkowitz* v. *Turley,* 414 U.S. 70 (1973); *Gardner* v. *Broderick,* 392 U.S. 273 (1968); *Uniform Sanitation Men* v. *Sanitation Comm'r.,* 392 U.S. 280 (1968); *Spevack* v. *Klein,* 385 U.S. 511, 515 (1967); *Garrity* v. *New Jersey,* 385 U.S. 493 (1967); *Griffin* v. *California,* 380 U.S. 609 (1965). See also Note, "Another Look at Unconstitutional Conditions," 117 U.Pa.L.Rev. 144 (1968). Thus, this Court has held that statements obtained during the course of disciplinary investigations under the threat of dismissal from public office cannot be used as evidence in a subsequent criminal prosecution. See, *e.g., Garrity* v. *New Jersey, supra.* So too, statutes voiding public contracts entered into by one who has asserted the Fifth Amendment privilege against self-incrimination have been held to be constitutionally infirm. *Lefkowitz* v. *Turley, supra.* In a similar vein, this Court has condemned the practice of mandatorily disbarring attorneys based upon their exercise of the Fifth Amendment right to remain silent. *Spevack* v. *Klein, supra.* In these and in other contexts, it was held that the law may not place a premium on the assertion of a valued constitutional right. See *Dunn* v. *Blumstein,* 405 U.S. 330 (1972); *Malloy* v. *Hogan,* 378 U.S. 1 (1964); *United States* v. *Derrick,* 519 F.2d 1 (6 Cir. 1975); *Hess* v. *United States,* 496 F.2d 936 (8 Cir. 1974).

This much conceded, it is equally clear that our Constitution does not serve to insulate those accused of criminal conduct from the necessity of making delicate choices. See, *e.g., Chaffin* v. *Stynchcombe,* 412 U.S. 17 (1973); *McGautha* v. *California,* 402 U.S. 183 (1971); *Brady* v. *United States,* 397 U.S. 742 (1970); *McMann* v. *Richardson,* 397 U.S. 759 (1970). *Cf. Colten* v. *Kentucky,* 407 U.S. 104 (1972). The criminal process, like the rest of the legal system, "is replete with situations requiring the making of difficult judgments as to which course to follow." *McGautha* v. *California, supra* at 213. The defendant in a criminal trial "is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction." *Williams* v. *Florida,* 399 U.S. 78, 83 (1970). So too, when an accused presents witnesses at trial, he must reveal their identity and submit them to cross-examination which, in itself, may prove incriminating or may furnish the prosecution with strong rebuttal evidence. *Id.* at 83-84. That the defendant faces such a dilemma "has never been thought an invasion" of his constitutional rights. *Id.* at 84; *State* v. *Corbitt,* 74 N.J. 379, 398, 378 A.2d 235, 245 (1977). The threshold question is whether compelling the election impairs to an appreciable extent any of the policies underlying the rights involved. *McGautha* v. *California, supra,* 402 U.S. at 213. Hence, the inquiry must focus upon whether the New Jersey murder statutes' sentencing scheme "unnecessarily" places a burden upon the accused's assertion of his constitutional right to defend against a criminal charge. *State* v. *Corbitt, supra,* 74 N.J. at 397, 378 A.2d at 244. Resolution of the issue requires examination of the nature and gravity of the choice confronting a defendant charged with murder.

Appellant claims that he was penalized by virtue of his election to proceed to trial. In essence, he contends that he would have been eligible for a term less than life imprisonment had he pleaded *non vult.* It is argued that the New Jersey murder statutes place an unconstitutional penalty upon the exercise of the right to contest the State's charges before a jury. Appellant argued below that one accused of murder is faced with the "grisly" choice between contesting the State's charges, thus assuring a penalty of life imprisonment if convicted of first degree murder, and pleading *non vult* with the attendant potential of being sentenced to a lesser term of years. It

is argued that such a grave choice exacts a penalty with regard to those who wish to exercise valued constitutional rights.

In support of this claim, defendant heavily relies upon *United States* v. *Jackson,* 390 U.S. 570 (1968). There, this Court declared invalid the death penalty provision of the Federal Kidnapping Act because it "unnecessarily" and "needlessly" burdened the defendant's right to contest the prosecution's charges before a jury. That statute provided that capital punishment could be imposed only upon a jury's recommendation which was binding on the trial court. 18 U.S.C. §1201(a). A defendant could be assured of avoiding the death penalty only by waiving a jury trial or entering a guilty plea. This Court reasoned that since the defendants could avoid the death penalty only by pleading guilty or proceeding to trial before a judge, they were "needlessly encourage[d]" to waive their basic rights both to contest guilt and to do so before a jury. 390 U.S. at 583. While recognizing the State's legitimate interest in jury-imposed capital punishment, the Court found that there were other means available which would subject all defendants to an equal risk of death and thereby eliminate the "unnecessary" and "excessive" burden upon defendants who desired a jury trial. 390 U.S. at 582.

As a result of the decision in *Jackson,* grave doubts were generated with respect to the validity of statutes which permitted a criminal defendant to avoid capital punishment by foregoing a jury trial. Like the Federal Kidnapping Act, the New Jersey murder statutes provided that only a jury could impose the death penalty. *State* v. *Forcella,* 52 N.J. 263, 245 A.2d 181 (1968), *cert.* den. *sub nom. New Jersey* v. *Presha,* 408 U.S. 942 (1972). However, our statutory scheme differed because a defendant could not be tried by a judge. *Id.* at 269, 245 A.2d

at 184. Furthermore, acceptance of a plea of *non vult,* by which a defendant could escape the possibility of facing death, was discretionary with the trial court. *Id.* at 270-71, 245 A.2d at 184-185. In *State* v. *Forcella, supra,* the New Jersey Supreme Court held that the Sixth Amendment challenge was meritless because the New Jersey statute required trial by jury in all cases in which the accused contested his guilt. *Id.* at 272, 245 A.2d at 185. As for the claim that the Fifth Amendment was violated, a majority reasoned that acceptance of a plea of *non vult* was discretionary with the trial judge, and thus, the impermissible encouragement to plead guilty that existed under the Federal Act was not present under the New Jersey statute. *Id.* at 279-80, 245, A.2d at 189-190. The majority further reasoned that the *non vult* plea was enacted pursuant to valid governmental interest to provide lenity for those who were willing to admit their guilt. *Id.* at 275, 245 A.2d at 187. The New Jersey Supreme Court, therefore, upheld our capital penalty provision in recognition that it constituted nothing more than a form of plea bargaining by allowing consideration to be given to the accused who admits his guilt. *Id.* at 275-276, 245 A.2d at 187.

Significantly, the majority in *Forcella* accurately forecasted the question in *State* v. *Corbitt, supra.* Specifically, the majority suggested that striking the death penalty might still leave a "*Jackson*-type difficulty" in that a defendant who pleads *non vult* would receive life or a term of years whereas a defendant found guilty of first degree murder would necessarily receive life imprisonment. Since the Court concluded that the New Jersey statutes did not fall afoul of the Fifth and Sixth Amendments, the majority found it unnecessary to resolve the issue. The two dissenting Justices were of the view that this Court's decision in *Jackson* were dispositive and that the New Jersey statutes

infringed upon the constitutional right to defend against the State's charges before a jury. The dissenters, therefore, found it necessary to squarely confront the question presented in *Corbitt*.

The dissenting opinion in *Forcella* rejected the contention that a statute mandating life imprisonment upon a conviction following a jury trial but permitting a lesser penalty upon a plea of *non vult* would be violative of the Fifth and Sixth Amendments. According to the dissent, "the inducement [to plead *non vult*] would be insignificant when compared to the death penalty stricken in *Jackson*." 52 N.J. at 300, 245 A.2d at 201. The dissenters aptly observed that "the law has always been administered with pragmatic recognition of the fact that the difference between the death penalty and imprisonment entails more than matters of logic and degree." *Id. Jackson* was distinguished upon the basis that it was "concerned solely with the grisly choice between a plea or waiver with an assurance of no death penalty, and a jury trial with the danger of capital punishment." *Id.* at 301. This same conclusion was reached by the New Jersey Supreme Court in *State* v. *Corbitt, supra,* 74 N.J. at 399, 378 A.2d at 235.

In any event, this Court was unconvinced by the majority's reasoning in *State* v. *Forcella, supra,* and summarily reversed and remanded the matter three years later. *Funicello* v. *New Jersey,* 403 U.S. 948 (1971). On remand, the New Jersey Supreme Court struck the capital penalty provision. *State* v. *Funicello,* 60 N.J. 60, 286 A.2d 55, *cert.* den. *sub nom. New Jersey* v. *Presha,* 408 U.S. 942 (1972). It ruled that in all future cases, those found guilty of first degree murder by a jury would be sentenced to a mandatory term of life imprisonment and that the penalty provisions applicable upon a plea of *non vult* would remain intact. *Id.* at 68, 286 A.2d at 59.

Hence, in 1972 the New Jersey Supreme Court provided the framework under which the murder statutes were to be applied and administered. Accordingly, a defendant who proceeds to trial faces the possibility of receiving a life sentence if found guilty of first degree murder. He may also be found guilty of second degree murder, in which case he faces a maximum exposure of 30 years imprisonment, N.J.S.A. 2A:113-4, or manslaughter, in which event he faces a maximum sentence of ten years, N.J.S.A. 2A:113-5. He may also be acquitted. A defendant who pleads *non vult* to murder may receive a sentence of life imprisonment. The court may, however, impose a maximum term of 30 years. N.J.S.A. 2A:113-3.

It is manifest that the sentencing scheme of the New Jersey murder statute is fundamentally different from that struck down in *United States* v. *Jackson, supra.* As noted previously, this Court found it constitutionally offensive to subject only those who contested their guilt before a jury to a greater penalty than all other similarly situated individuals who elected to contest the State's charges. Under the New Jersey statutes, however, the defendant faces exactly the same maximum sentence exposure. Whether he proceeds to trial or enters a plea of *non vult,* he cannot avoid the potential of receiving a life sentence by admitting the State's charges. This exposure to the identical maximum sentence eliminates the incongruity found offensive in *United States* v. *Jackson, supra.* In sum, no penalty whatever is imposed upon an accused who elects to defend against the State's charges.

2. *United States v. Jackson applies only where the death penalty is a consideration in the decision to defend against a charge or plead guilty.*

The question, therefore, is whether the mere possibility of receiving a term of less than life imprisonment by pleading *non vult* "unnecessarily" serves to penalize those who elect to contest their guilt. Stated somewhat differently, at issue is whether our statutory scheme places an unwarranted and needless burden upon an accused who wishes to defend against the State's charges by mandating life imprisonment upon a jury finding of guilt. As we have noted, the strength of the inducement to obtain the benefit and avoid the burden can be ascertained only by carefully focusing upon the magnitude of the choices involved. In our view, *United States* v. *Jackson, supra,* is clearly distinguishable in this respect because capital punishment is qualitatively different than mere imprisonment. Its finality and severity make the death penalty *sui generis.* Although this Court has recently held that capital punishment is not per se "cruel and unusual" and, hence, violative of the Eighth Amendment [*Gregg* v. *Georgia,* —— U.S. ——, 96 S. Ct. 2909 (1976)], it has been recognized that "[t]he calculated killing of a human being by the State involves by its very nature, a denial of the executed person's humanity." *Furman* v. *Georgia,* 408 U.S. 238, 290 (1972). So too, it has been said that "[d]eath is not only an unusually severe punishment, unusual in its pain and its enormity . . .," but it is also "truly awesome" because it destroys the right of an executed person "to have rights." *Furman* v. *Georgia, supra,* 408 U.S. at 290. "Death is a punishment different from all other sanctions in kind rather than degree." *Woodson* v. *North Carolina,* —— U.S. ——, 96 S.Ct. 2978 (1976). See also *Roberts* v. *Louisiana,* —— U.S. ——, 96 S.Ct. 3001 (1976). Certainly, the enormity of choosing

between life and death precludes a meaningful exercise of the right to assert one's innocence. The *Jackson* decision made constant reference to the inordinate burden of facing the choice between life and death. 390 U.S. at 572, 581. As the Court noted:

> Under the Federal Kidnapping Act, therefore, the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. (390 U.S. at 580.)

Capital punishment has always been regarded as such a unique penalty that any choice between life and death has been characterized as a "grisly" one. See, *e.g., Furman* v. *Georgia,* 408 U.S. 238, 286-90 (1972) (Brennan, J., Concurring); *Fay* v. *Noia,* 372 U.S. 391 (1963); *United States* v. *Coke,* 404 F.2d 836, 846 n. 9 (2 Cir. 1968); *Commonwealth* v. *O'Neal,* 339 N.E. 2d 676, 680 (Mass. 1975). It is evident that the possibility of death is a far different price to pay for contesting one's guilt than the risk of a sentence of life imprisonment instead of a possible term of years.

Subsequent judicial holdings have made it apparent that *United States* v. *Jackson, supra,* forbids only government induced choices of a substantial nature akin to that involving the clear cut question between life and death.

In *Crampton* v. *Ohio,* 402 U.S. 103 (1971), this Court upheld the constitutionality of Ohio's system of conducting criminal trials. In Ohio, the jury is permitted to determine guilt and punishment in a single proceeding. Petitioner argued that unless the trial were bifurcated, he would be coerced to forego his right to remain silent in

order to argue for mitigation. This he contended "chilled" his Fifth Amendment right because he risked a harsher sentence if he remained silent. This Court held that the Ohio system did not place an impermissible burden on the petitioner's assertion of his Fifth Amendment right. In short, the Court concluded that, "although a defendant may have a right, even of constitutional dimension, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." 402 U.S. at 213. In so holding, it was noted that the decision in *Jackson* was limited to government compelled choices involving life and death.

Similarly, in *Chaffin* v. *Stynchcombe,* 412 U.S. 17 (1973), this Court reiterated the principles set forth in *Crampton* v. *Ohio, supra,* and upheld Georgia's unrestricted jury resentencing procedures. Petitioner had been convicted and sentenced to 15 years in prison by a jury on a charge of robbery. He thereafter successfully obtained a writ of habeas corpus. Petitioner was then retried, convicted, sentenced to life imprisonment by a jury which had no knowledge of the previous sentence. Petitioner argued that the possibility of receiving a harsher sentence on retrial had a chilling effect on the exercise of his right to appeal or collaterally attack his conviction. The Court was unpersuaded and rejected petitioner's claim that its holding in *United States* v. *Jackson, supra,* called for abrogation of the Georgia system. It reasoned that the Georgia practice was a legitimate one and that an incidental consequence of the procedure was that it required the accused to choose to accept the risk of a greater sentence or waive his rights. 412 U.S. at 32-33. Despite the fact that under Georgia's system an accused might be penalized by exercising his right to appeal, the Court held that the possibility of receiving a harsher sentence did not needlessly exact an unconstitutional burden. 412 U.S. at 35.

Courts in other jurisdictions besides New Jersey have also construed the holding in *United States* v. *Jackson, supra,* as applying only to the "grisly" choice between life and death. In *Whaley* v. *State,* 202 Kan. 175, 446 P.2d 397 (1968), for example, the Kansas Supreme Court rejected a claim that an accused was discouraged from asserting his Fifth and Sixth Amendment rights because of the possibility that the prosecutor would invoke the habitual offender statute if he proceeded to trial. The Court noted that the possibility of an enhanced sentence by electing to contest the State's charges does not alone constitute a burden of the magnitude involved in *Jackson. Id.* at 176, 446 P.2d at 398.

Likewise, the Illinois Court of Appeals has held that the financial burden placed upon an accused who elects to contest his guilt by proceeding to trial does not constitute a "substantial" penalty for the assertion of a constitutional right. In *People* v. *Peters,* 32 Ill. App. 3d 1018, 337 N.E. 2d 73 (Ill. App. Ct. 1975), defendant contended that an Illinois statute which required an accused to reimburse the State's attorney with respect to per diem expenses upon conviction following a trial, deprived him of his Fifth Amendment right to contest his guilt More specifically, it was argued that an assessment of trial costs made pursuant to the statute constituted a penalty imposed by virtue of the defendant's election to defend against the State's charges. The Court of Appeals summarily rejected defendant's claim that *United States* v. *Jackson, supra,* was applicable. The Court held that the financial burden imposed by the statute was infinitely less substantial than the possibility of receiving the death penalty. Hence, the statute did not serve to penalize those who elected to contest their guilt. See also *Fuller* v. *Oregon,* 417 U.S. 40 (1974) (Oregon recoupment statute for attorney's fees does not impermissibly chill assertion of the right to counsel).

It is thus apparent that the mere possibility of receiving a lesser term of imprisonment upon a plea of *non vult* does not serve to penalize those who choose to defend against the State's charges. Even were we to conclude that our statutory scheme imposes a burden with respect to those who elect to contest their guilt, it would not fall afoul of the Fifth and Sixth Amendments. The New Jersey murder statutes do not suffer from the same infirmity as that found to be present in the Federal Kidnapping Act in *United States* v. *Jackson, supra.* The election compelled by our statutes does not impair "to an appreciable extent" any of the policies which the Fifth and Sixth Amendments seek to protect. In short, our statutory scheme does not compel a defendant to choose between exercising his constitutional rights with the attendant risk of exposing himself to the death penalty and pleading *non vult,* thereby avoiding the danger of capital punishment. *State* v. *Corbitt, supra,* 74 N. J. 379, 399, 378 A.2d 235, 245 (1977).

3. No needless nor unnecessary burden is placed upon a defendant who chooses to contest his guilt.

It is the position of the State of New Jersey that *United States* v. *Jackson, supra,* is inapposite for another reason. As we have noted, the Supreme Court concluded that the death penalty provision in the Federal Kidnapping Act "needlessly encourage[d]" those charged with having committed the offense to waive their rights both to contest guilt and to do so before a jury. *Id.* at 583. The federal statute was said to impose an "unnecessary" and "excessive" burden upon those who desired a jury trial. *Id.* at 582. The use of these terms by this Court plainly indicates that not every burden imposed upon a defendant who elects to contest the State's charges is subject

to constitutional attack. As already pointed out, numerous consequences necessarily flow from a decision to exercise the Fifth Amendment privilege against self-incrimination. For example, although an accused is under no constitutional obligation to present witnesses or to testify in his own behalf at trial, such a course of conduct may substantially increase the risk of conviction. But we have noted that such a dilemma has never been thought an invasion of a defendant's constitutional rights, for the burden imposed is neither "needless," "unnecessary," nor "excessive." The inquiry must thus focus upon whether the option present in the New Jersey statutory scheme is reasonably related to a proper governmental goal.

We note in this context that if the Fifth Amendment bars a lesser penalty when guilt is admitted, the entire practice of plea bargaining is necessarily implicated. In the aftermath of *Jackson,* it was widely recognized that plea bargaining was subject to doubt. See, *e.g.,* Comment, 54 *Cornell L. Rev.* 448 (1969); Poe, "Capital Punishment Statutes in the Wake of *United States* v. *Jackson*: Some Unresolved Questions," 37 *Geo. Wash. L. Rev.* 719 (1969); "The Supreme Court, 1967 Term," 82 *Harv. L. Rev.* 63, 156 (1968); Note, "The Unconstitutionality of Plea Bargaining," 83 *Harv. L. Rev.* 1387 (1970); Comment, 44 *N.Y.U. L. Rev.* 612 (1969); Comment, 47 *N.C. L. Rev.* 421 (1969); Note, "Discriminatory Sentencing and the Unitary Trial: Two Areas For Application of the United States v. Jackson Rationale," 31 *U. Pitt. L. Rev.* 118 (1969); Comment, 1969 *Wash. U.L.Q.* 231 (1969). See also Comment, 22 *Rutgers L. Rev.* 167 (1967). The broadest interpretation of *Jackson* could conceivably lead to a conclusion that whenever a system provides a means to obtain leniency, either by statute or practice, a defendant who rejects a proposed plea bargain, contests guilt, and thus receives a heavier penalty is deprived of his Fifth Amendment rights.

Such broad implications were quickly dispelled by this Court in *Brady* v. *United States,* 397 U.S. 742 (1970), *Parker* v. *North Carolina,* 397 U.S. 790 (1970), and *North Carolina* v. *Alford,* 400 U.S. 25 (1970). There, defendants, who had pleaded guilty to avoid the possible imposition of the death penalty, attempted to retract their pleas by asserting that the statutes under which they were prosecuted dissuaded them from asserting their constitutional rights. The principal thrust of their argument was grounded upon the claim that they had abandoned their right to defend in order to safeguard their right to live. They thus asserted that their guilty pleas were "coerced." This Court perceived no constitutional violation. More specifically, it was reasoned that the defendants' dilemma was no different from the circumstances existing in any common plea bargaining situation. 397 U.S. at 751. Although it was recognized that plea bargaining has a potentially chilling effect on assertion of Fifth and Sixth Amendment rights, the practice was upheld as a necessary and legitimate adjunct to the administration of criminal justice. 404 U.S. at 751-753.

This Court subsequently reiterated its position with regard to plea bargaining. In fact, in *Santobello* v. *New York,* 404 U.S. 257 (1971), it was suggested that plea bargaining is a virtuous and desirable practice which should be encouraged. This, despite the fact that plea bargaining presents a potentially chilling effect upon the assertion of the constitutional right to defend.

It bears repeating that plea bargaining is predicated upon the just and humane concept that those who acknowledge guilt are probably better prospects for rehabilitation and should be given consideration on that account. Surely, "we should not deny a justified leniency for the many, merely to be positive that no man is needlessly encouraged

not to defend." *State* v. *Forcella, supra,* 52 N.J. at 276, 245 A.2d at 188. The gain to the many plainly outweighs whatever evil may repose in encouraging the guilty to confess. As to the fear that the innocent might be stampeded, "there are safeguards against a false guilty plea." *Id.* A plea of guilty may not be entered if the accused claims he is innocent. Further, in New Jersey a "factual basis" must support the defendant's decision not to contest the State's charges. See *State* v. *Reali,* 26 N.J. 222, 139 A.2d 300 (1958). With respect to those who perceive a benefit in the form of a lesser sentence if they plead guilty, it can hardly be argued that they are "needlessly" penalized by virtue of their election to reject such a course. The potential of receiving a lesser penalty upon a plea of guilty is not "unnecessary." Nor is the burden that is incidentally imposed upon such an individual "excessive."

Our *non vult* statute embodies the principles of plea bargaining. It achieves the same result as the downgrading of offenses or the dismissal of selected charges. The statute cannot be found to unnecessarily and needlessly discourage assertion of an individual's Fifth and Sixth Amendment rights. A defendant who proceeds to trial on a murder charge no longer faces a "grisly" choice. His knowledge that those who plead *non vult* face the same possibility of a life term certainly diminishes any alleged agony inherent in his choosing a trial over a plea. Finally, his knowledge that others who plead may receive a sentence less than life imprisonment is no different from the situation confronting all defendants who proceed to trial, aware of the fact that others have obtained bargains to plead guilty in exchange for dismissal of other pending charges or for some other benefit. In short, there are no excessive or unnecessary conditions encompassed in the present New Jersey murder statutes such as to render them unconstitutional.

B. The sentencing scheme of N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4 does not constitute a violation of a defendant's right to equal protection.

The Appellant has argued that the sentencing scheme of the New Jersey murder statute violates the Equal Protection Clause of the Fourteenth Amendment. He has pointed to the fact that those who have pleaded *non vult* may be sentenced to a term of years, while others who have been convicted of first degree murder following a trial are necessarily sentenced to life imprisonment. N.J.S.A. 2A:113-3, 4. The import of the argument is that the State may not impose "different punishments for the same" crime where the differing penalties are based entirely on whether the accused has chosen to stand trial. (See Jurisdictional Statement at 12).

It is the contention of the State of New Jersey that it would be grossly unfair if all had to be sentenced without regard to their acknowledgment of guilt. While it is true that the law may not add a penalty by virtue of a defendant's election to contest the State's charges, *Scott* v. *United States*, 419 F.2d 264 (D.C. Cir. 1969), *Thomas* v. *United States*, 368 F.2d 941 (5 Cir. 1966), it is not irrational to take into account "defendant's prospect for redemption reflected by his attitude toward the truth." *State* v. *Poteet*, 61 N.J. 493, 295 A.2d 857 (1972). As the New Jersey Supreme Court aptly observed in *State* v. *Poteet*, *supra*, "[t]he aims of punishment are several, but the hope is constant that . . . mild or severe, [it] will shape the offender." *Id.* at 496, 295 A.2d at 859. "Assaying the prospects for rehabilitation, the court must look at the man as well as the offense," and it is here that a defendant's candid acknowledgment of guilt should be given some consideration. *Id.* Although it would be conceptually wrong to enlarge the crime for which a defendant is being

punished because he chose to stand trial, it is equally clear that a legislative judgment based upon the premise that a frank confession indicates some promise of rehabilitation is neither unsound nor unjust. In any event the State of New Jersey has exhaustively set forth its argument with regard to this question in Point A. Suffice it to say, we do not perceive it to be a violation of equal protection to accord a benefit to those who have acknowledged their guilt by pleading *non vult*.

Other considerations support our position. First, our statutes do not provide disparate punishments "for the same offense." A short form indictment is sufficient to encompass first and second degree murder. Hence, a defendant is not permitted to plead *non vult* to any particular degree of murder. In the words of the statute, the plea is to be directed "to the indictment" which charges murder generally. In contrast, the mandatory term of life imprisonment is applicable only following a jury finding of first degree murder. It is apparent, therefore, that those who plead *non vult* to "murder" and those who are found guilty of first degree murder are not similarly situated. The sentencing scheme merely reflects this basic reality. Second, an Equal Protection argument is predicated upon the erroneous assumption that all similar conduct constitutes the "same offense." Although we will shortly set forth our argument in some detail, it is enough to observe here that criminal statutes often overlap in prohibiting the same conduct and a prosecutor's decision to proceed under one or another has never been thought to offend the concept of equal protection. The same principles are applicable with respect to our murder statutes. Although the offense of "murder" and "murder in the first degree" may be said to "overlap," equal protection is not offended as

long as the court does not act arbitrarily in exercising its discretionary power to accept or reject a plea of *non vult*.

1. There is no cognizable class against which equal protection is being denied.

The guarantee of equal protection requires that a legislative classification bear a rational relationship to a legitimate governmental goal. See *Tussman and Ten broek,* "The Equal Protection of the Laws," 37 *Calif. L.Rev.* 341, 348 (1949); Note, "Developments in the Law: Equal Protection," 82 *Harv. L.Rev.* 1065, 1077-81 (1969). When a legislature creates a classification, those similarly situated must be treated alike. *Tussman and Ten broek, supra* at 344-46. It is manifest that the threshold question in resolving any alleged equal protection violation is whether the challenged legislation or state practice creates any classification whatsoever. The point is best illustrated by Justice Harlan's dissenting opinion in *Griffin* v. *Illinois,* 351 U.S. 12 (1956). There, it will be recalled, the majority held the Illinois practice which required an appellant to absorb the costs of providing a transcript on appeal constituted a violation of equal protection because it unreasonably discriminated on the basis of wealth. Justice Harlan dissented, contending that the basis for the majority holding was not equal protection but rather due process. 351 U.S. at 36. He explained that when the State imposes legal disabilities upon a named class the equal protection guarantee is called into question. *Id.* at 35-36. Merely posing a choice or condition to receipt of a State-proffered benefit, on the other hand, involves no classification. *Id.* Accordingly, such a system is properly analyzed by employing the "fundamental fairness" standard of the due process clause. *Id.* at 36.

In the instant case, the initial inquiry is whether the Legislature has in fact made any classification which arbitrarily treats those similarly situated. Otherwise stated, the question presented is whether the New Jersey Legislature has singled out a particular group of individuals and arbitrarily imposed upon that class a legal disability that it does not impose upon all others in a like position. So posited, the State of New Jersey submits that the only class created by the Legislature was the unitary category of indicted murderers. Our statutes offer a series of effectively identical choices to all members of this class. Specifically, all defendants have the opportunity to plead *non vult*. Acceptance of the plea, of course, is in the discretion of the court. Of significance, however, is that all defendants possess an equal opportunity to request the court's indulgence. Thus, the system does not designate two separate classes to which it imposes distinct legal disabilities. Rather, our system merely provides several courses of action to all defendants charged with murder. As such, it is evident that this case does not implicate values underlying the equal protection clause. Rather the question presented is one of due process. Specifically, the issue is whether the election compelled by our statutory scheme is fundamentally unfair. The fairness of the choice, phrased in terms of whether it is unconstitutionally onerous, has been amply demonstrated in Point A, *supra*. Accordingly, we submit that appellant's contention regarding the alleged denial of the equal protection guarantee is without merit.

2. Assuming a cognizable class, there is no disparity of punishment for the same offense.

A *non vult* plea to murder in New Jersey does not involve the same crime as a conviction for first degree mur-

der, although in some circumstances both may encompass similar conduct. First degree murder is a crime in which conduct of a specific nature and quality is proscribed. The sentence for such conduct is life imprisonment. A *non vult* plea is not comparable to a conviction of a specific degree of murder. *State* v. *Sullivan,* 43 N.J. 209, 245, 203 A.2d 177, 197 (1964), *cert.* den. 382 U.S. 990 (1966); *State* v. *Williams,* 39 N.J. 471, 479, 189 A.2d 193, 197 (1963), *cert.* den. 374 U.S. 855 (1963). Rather, it is a plea to the indictment encompassing conduct which may constitute both degrees of murder, and manslaughter as well. *State* v. *Sullivan, supra,* 43 N.J. at 246, 203 A.2d at 197. The plea must be accepted without specification of the degree of guilt. *Id.* Accordingly, the sentence for the plea spans the broad range of conduct encompassed by the indictment. It is apparent that a plea of *non vult* is for an offense different from first degree murder because it includes a far broader range of criminal conduct.

It was upon this basis that a similar claim was rejected by the New Jersey Supreme Court in *State* v. *Sullivan, supra.* There, the defendant had been convicted of first degree murder. On appeal, he contended that our murder statutes exacted a penalty with regard to those who elected to contest their guilt. It was argued that disparate penalties were imposed depending upon the accused's election to plea *non vult* or contest the State's charges. Defendant claimed that such an election deprived those charged with murder "of due process and equal protection of the law." *Id.* at 245, 203 A.2d at 197. The court was unpersuaded.

> Not only is there no right to demand acceptance of a plea of *non vult,* but acceptance thereof by the court confers no right to any particular sentence short of life imprisonment. As N.J.S.A. 2A:113-3 prescribes, the term may be for life or for any

> period up to the 30-year maximum for second degree murder. *One reason for the broad expanse of sentencing power is the nature of the indictment.* As we have said, *it specifies no degree of murder, and will support a conviction of first or second degree murder or manslaughter.* (We note in passing it has been suggested persuasively that there is nothing in our rules or statutes which prohibits a specific indictment for second degree murder in a proper case.) *Under our cases the plea must be to the indictment.* It should *not* be to a specific degree of murder. *Nor does the statute, as in earlier days, contemplate a hearing to determine the degree of guilt or the nature of the sentence to be imposed. State* v. *Williams,* 39 N.J. 471, 479 (1963). Sentence is passed by the court within the broad limits authorized after consideration of the nature of the offense and a comprehensive probation report. R.R. 3:7-10(b). [*Id.* at 246-247, 203 A.2d at 197; emphasis supplied].

Appellant contends that since an accused who theoretically commits the same crime as one convicted of first degree murder may plead *non vult,* our statutes impose different punishments for the same offense. This argument is based on the faulty assumption that all similar conduct constitutes the same crime. It is evident, however, that an accused's conduct may violate two overlapping statutes. Where there is such an overlap, the prosecuting authority has discretion to proceed under either statute. *United States* v. *Berrigan,* 482 F.2d 171 (3 Cir. 1973); *Newman* v. *United States,* 127 U.S. App. D.C. 263, 382 F.2d 479, 480 (1967). So long as the prosecutor does not act arbitrarily and does not discriminate against a class of defendants, it has been held that equal

protection is not denied. *United States* v. *Rugiero,* 472 F.2d 599, 606 (2 Cir. 1973), *cert.* den. 412 U.S. 939 (1973); *United States* v. *Eisenmann,* 396 F.2d 565, 568 (2 Cir. 1968); *United States* v. *Andrews,* 370 F.Supp. 365, 370 (D. Conn. 1974). In short, the mere existence of overlapping statutes is not a deprivation of equal protection.

Just as two or more statutes may cover the same conduct so that different penalties may be imposed for the identical offense, the New Jersey murder statutes may be said to "overlap." The major difference is that under our murder laws, the discretion to administer the statutes does not reside solely in the prosecutor. Instead, the accused may tender a plea of *non vult,* but the court must decide whether to accept it. If a conviction for first degree murder best serves the legislative purpose, the plea must be rejected or a comparable sentence be imposed. *State* v. *Sullivan,* 43 N.J. 209, 203 A.2d 177 (1964), *cert.* den. 382 U.S. 990 (1966); *State* v. *Forcella,* 52 N.J. 263, 245 A.2d 181, *cert.* den. *sub nom. New Jersey* v. *Presha,* 408 U.S. 942 (1972).

To further clarify the point, the situation can be viewed in a slightly different fashion. In many instances in which an individual commits a criminal act, his conduct may constitute both a greater and lesser offense. For example, activity which constitutes atrocious assault and battery in New Jersey is also proscribed by our disorderly persons statute. Activity which constitutes robbery also falls within our larceny statute. The prosecutor has discretion to choose the charge. Furthermore, he can charge the greater offense and then later downgrade it in exchange for a plea of guilty. The individual who is tried and convicted of the greater offense is not denied equal protection because another who may have engaged in similar conduct is either charged or convicted of the lesser crime.

Analogously, one who is convicted of first degree murder cannot complain that he was denied equal protection because another was permitted to plead *non vult.* Viewed within this context, it is apparent that equal protection is denied only if the various relevant statutes are applied in an arbitrary or discriminatory fashion. If no particular class is singled out for harsher treatment, the equal protection clause is not violated.

3. The penalty provisions of N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4 are not applied arbitrarily nor irrationally.

Any analysis of the manner in which statutes are applied must be considered in light of the proposition that "Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only if no grounds can be conceived to justify them." *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802, 809 (1969). As long as some reasonable basis exists for the recognition of separate classes and disparate treatment, and the legislation has a rational relation to the object sought to be achieved, there is no constitutional infirmity. See *Eisenstadt* v. *Baird,* 405 U.S. 438, 446-447 (1972); *United States* v. *Maryland Savings-Share Ins. Corp.,* 400 U.S. 4 (1970). The function of the judiciary in reviewing a statute "is to determine whether it is possible to say that the legislative decision is without rational basis." *Clark* v. *Paul Gray,* 306 U.S. 583, 585 (1939).

It is the position of the State of New Jersey that the rational relationship test for determining equal protection should be utilized in analyzing the sentencing provisions of the murder statutes. This court, recognizing this traditional test, has in recent years recognized that

there are some situations where it is inappropriate to apply the "rational relationship" test. Certain statutory classifications are so inherently suspect as to compel greater judiciary scrutiny (*i.e.*, those based on race, nationality, alienage, political affiliation and sex). So too, statutory schemes which affect fundamental rights are to be carefully reviewed. In these cases, a stricter equal protection standard has been fashioned by this Court requiring a showing that the statutory scheme challenged is based upon a "compelling governmental interest." Phrased somewhat differently, if a statutory classification is based upon an inherently suspect criterion, or if it affects fundamental rights, then it must be demonstrated that the legislation is necessary to promote a compelling governmental interest. See *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) (Harlan, J. dissenting). A heavy burden of justification is imposed upon the State and such statutes are closely scrutinized in light of their essential purposes. *Dunn* v. *Blumstein,* 405 U.S. 330 (1972). *State* v. *Chambers,* 63 N.J. 287, 307 A.2d 78 (1973).

It is submitted that the New Jersey statutory scheme for murder does not create a classification which is "inherently suspect." It does not affect fundamental rights, *i.e.,* those which are based solely on race, nationality, political affiliation, sex, the right to vote or the right to travel. Nor does our statute affect the fundamental right to live. The latter classifications have been found to be inherently suspect and, thus, have been evaluated under the "compelling governmental interest" formula. See *e.g. Frontiero* v. *Richardson,* 411 U.S. 677, 686-87 (1973); *Reed* v. *Reed,* 404 U.S. 71, 75 (1971); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Dunn* v. *Blumstein,* 405 U.S. 330 (1972). On the other hand, legislatures are allowed considerable leeway in classifying offenses and offenders for sentencing purposes, provided there is a rational nexus

between the classification and a valid legislative purpose. *Kahn* v. *Shevin,* 416 U.S. 351 (1974); *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966).

When an individual violates a penal law, he is generally subject to incarceration. In short, he has lost his right to liberty. In such instances, the State need not demonstrate a compelling governmental interest to support incarceration. Rather, it need only be shown that the punishment imposed is reasonably related to a proper governmental goal. Thus, the proper test to be employed here is the "rational relationship" formula. *State* v. *Corbitt,* 74 N.J. 379, 401, 378 A.2d 235, 247 (1977). See *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973).

It is apparent that a mandatory life term for first degree murder is reasonably related to the goal of deterrence. Mandatory penalties are within the power of the legislature to prescribe and the judiciary seldom acts to challenge their validity. See *State* v. *Howland,* 103 Ariz. 250, 439 P.2d 821 (1968); *McDonald* v. *State,* 501 F.2d 385 (8 Cir. 1974), *cert.* den. 419 U.S. 1004 (1974); *State* v. *Colcord,* 170 Minn. 502, 212 N.W. 894 (1927). In this context, the statutory penalty challenged here serves as a warning to those who might be predisposed to commit the criminal offense that they will be harshly dealt with upon conviction. The penalty is applicable to a class of offenders whose disregard for life justifies severe punishment.

In any event, it is clear that the penalty is supported by a compelling governmental interest. It is incumbent upon the State to protect its citizens against premeditated and deliberate attacks. In sum, the statutory penalty serves a compelling governmental interest in deterring criminal conduct. The judiciary cannot and should not substitute its judgment for that of the Legislature.

On the other hand, the penalty provided for a plea of *non vult* to murder without specification as to degree, an offense which is different from first degree murder, is rational. The penalty range is necessarily broad since the criminal conduct encompassed is great. This range is reasonably related to the governmental goal of promoting rehabilitation. Since the penalty provisions of N.J.S.A. 2A:113-3, 4 are reasonably related to proper governmental goals, we respectfully submit that the guarantee of equal protection is not denied by the sentencing scheme of the statutes.

III.

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal.

Respectfully submitted,

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